UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VELOX EXPRESS, INC.	
	Case 15-CA-184006
And	
JEANNIE EDGE,	
An Individual	

BRIEF OF *AMICUS CURIAE* SIGNATORY WALL AND CEILING CONTRACTORS ALLIANCE

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I. STATEMENT OF INTEREST

The Signatory Wall and Ceiling Contractors Alliance ("SWACCA") submits this *amicus curiae* brief in support, in part, of the decision by Administrative Law Judge Arthur Amchan ("the ALJ") in *Velox Express, Inc.*, No. 15-CA-184006, 2017 WL 4278501 (N.L.R.B. Sept. 25, 2017).

SWACCA is a national, non-profit trade association that advocates for the interests of union-signatory wall and ceiling construction industry employers. SWACCA represents more than 300 wall and ceiling construction employers—including many of the largest employers in our industry— who perform framing, drywall and interior systems work nationwide, primarily in the commercial construction industry. Our members employ many thousands of carpenters, drywall finishers, plasterers and other building trades personnel throughout the United States.

The ALJ's finding in this case that misclassification of employees is itself a violation of Section 8(a)(1) of the National Labor Relations Act ("NLRA"), see *id.* at 10-11, is of particular interest to SWACCA and the construction industry as a whole.[1] Misclassification of employees is commonplace and, frankly, advantageous in the construction industry for reasons that include the preemptive impact of misclassification on employees' rights under the NLRA. The widespread nature of the practice undermines law-abiding construction industry employers, making it difficult for legitimate construction employers to compete in the marketplace. The ALJ's decision is a step in the direction of protecting construction industry employees against the preemptive impacts of misclassification and leveling the playing field for law-abiding construction industry employers.

[1] SWACCA takes no position on the remainder of the ALJ's findings.

II. INTRODUCTION AND QUESTION PRESENTED

In its Notice and Invitation to File Briefs, the National Labor Relations Board ("the Board") invited interested *amici* to file briefs on the following question: "Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?" This question is especially relevant in the construction industry, where misclassification is common and can provide an employer with a significant competitive advantage.

The incentives to misclassify construction industry employees are great. In the wall and ceiling industry, labor costs frequently represent as much as 70% of total project costs. Specific costs associated with lawful employment include workers' compensation insurance premiums, unemployment insurance premiums, and payroll taxes. Additional costs include but are not limited to worker safety training and compliance with employment laws such as overtime requirements under the Fair Labor Standards Act. In markets covered by collective bargaining agreements there are typically additional financial obligations to employees' health and retirement plans.

Workers' compensation and unemployment insurance premiums alone can represent more than 15% of total labor costs in the wall and ceiling industry. The elimination of workers compensation and unemployment insurance premiums therefore confers an immediate, more than 10% total project cost advantage to an employer who misclassifies his employees. It's important to note that this more than 10% cost advantage assumes full compliance with tax and other legal requirements in an already unlawful relationship and doesn't include the additional

cost advantage gained over employers whose properly classified employees exercised their rights under the NLRA to form a union and negotiate for contributions to benefit plans.

The nature of the construction industry reduces the risk to employers willing to misclassify employees. First, the majority of the construction industry operates on a project basis, which isolates misclassification risks to specific time periods. Second, the construction industry relies heavily on foreign-born workers who are especially vulnerable to employee misclassification. The presence of foreign-born workers in the wall and ceiling segment of the construction industry is especially significant. According to the National Association of Home Builders, nearly half of all drywall installers, ceiling tile installers, and tapers in the United States are foreign born. (Nat't Ass'n of Home Builders, *Immigrant Workers in the Construction Labor Force* (dated Feb. 13, 2015), available at https://www.nahbclassic.org/fileUpload_details.aspx?contentTypeID=3&contentID=241345&subContentID=637756.) These realities of the wall and ceiling construction industry mean employers who misclassify their employees are less likely to be caught and held accountable for their violations, resulting in rampant employee misclassification in the construction industry and a significant disadvantage to employers unwilling to participate in the scheme.

The Board has already laid the foundation for the ALJ's finding here in its decisions holding that employers are prohibited from launching preemptive strikes against concerted activity by employees. *See, e.g.*, *Parexel Int'l, LLC*, 356 NLRB No. 82 (2011). In the construction industry, and regardless of motive, employee misclassification by employers is just that: a preemptive strike against potential concerted activity by employees, resulting in a significant competitive advantage (including decreased labor costs) over law-abiding employers.

For this reason, SWACCA respectfully requests that the Board affirm the ALJ's finding that a misclassification by an employer is a violation of Section 8(a)(1) of the NLRA.

III. SUMMARY OF FACTS

This case arises from the termination of an independent contractor agreement between Jeannie Edge ("Edge") and Velox Express, Inc. ("Velox"). *Velox*, 2017 WL 4278501 at 2-6. The General Counsel alleged, *inter alia*, that Velox violated the NLRA by discharging Edge and by misclassifying its drivers as independent contractors. *Id.* at 1. The ALJ found that Edge was an employee of Velox, that Velox violated the NLRA in discharging Edge, and that Velox further violated the act by misclassifying other drivers as independent contractors. *Id.* With respect to the misclassification issue, the ALJ specifically found that:

> [b]y misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged from trying to form, join or assist a union or act together with other employees for their benefit and protection.

Id.

IV. ARGUMENT

A. Board precedent and policy support the ALJ's finding that misclassification of employees is a violation of Section 8(a)(1).

In *Parexel International*, the Board observed that it "has often held that an employer violates the Act when it acts to prevent future protected activity." 356 NLRB No. 82 at 5; *see also, id.* n.9 (citing cases). It explained that, "the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity. As the Supreme Court explained in affirming the Board's holding that a refusal to hire union members

is unlawful, such practices are 'a dam … at the source of supply.'" *Id.* (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941)).

And in *Sisters' Camelot*, 363 NLRB No. 13 at 8 (2015), the Board found that an employer violated the NLRA "by informing employees that it would never accept a 'boss/employee relationship' with the canvassers, a statement that … indicated that union organizing would be futile because the [employer] would never bargain with the Union as their representative."[2]

The policy underlying *Parexel* and *Sisters' Camelot* is clear: an employer cannot preempt, or attempt to preempt, statutorily protected activity by employees. As the Board noted in *Parexel*, "[i]f an employer acts to prevent concerted protected activity—to 'nip it in the bud'—that action interferes with and restrains the exercise of Section 7 rights and *is unlawful without more*." 356 NLRB No. 82 at 5 (emphasis added). Turning to the question presented in this case, the misclassification of employees as independent contractors functions as a preemptive strike against what would otherwise be protected activity by those employees. Thus, the ALJ's finding that Velox's misclassification of employees was itself a violation of Section 8(a)(1) is supported by Board precedent. Affirming the ALJ's finding would be consistent with this precedent and the important policy of preventing employers from interfering with or discouraging future protected activity by employees.

B. Misclassification of employees is a pervasive problem in the construction industry, resulting in an unlevel playing field for law-abiding employers.

[2] Specifically, the employer informed the canvassers that it "respected canvassers' right to organize, but that it could not 'accept any terms which force us into the role of bosses.'" *Sisters' Camelot*, 363 NLRB No. 13 at 8.

Undoubtedly, there are significant advantages to misclassifying employees as independent contractors in the construction industry. Labor costs are lowered considerably when an employer does not have to pay payroll taxes, workers' compensation premiums, unemployment insurance premiums, and is generally not subject to the obligations of labor and employment laws, including the National Labor Relations Act. As noted above, an employer that misclassifies its employees immediately reduces its total project cost by more than 10% simply by eliminating unemployment and workers compensation premiums – potentially much more if the employer is willing to violate other laws and/or is operating in a market where competing employers are signatory to collective bargaining agreements. These savings allow an employer to consistently underbid its law-abiding competitors by significant margins.

Several examples demonstrate the lengths to which some employers will go to save costs and to avoid their obligations under federal law:

- In 2010, a drywall employer was sentenced to federal prison for structuring a financial transaction.[3] By employing undocumented workers as drywall laborers, he was able to pay below-market wages and avoid employment taxes. In announcing the 12-month sentence, the U.S. Attorney noted that, "[t]hese low wages and the absence of costs for income taxes, employment taxes, worker's compensation, unemployment insurance, and other benefits paid by legitimate employers allowed Stubbs *to underbid fellow contractors and gain a significant share of the drywall business* in the [Anchorage area]" (emphasis added). (U.S. Attorney News Release dated Sept. 23, 2010, available at

[3] The employer structured financial transactions to avoid federal reporting requirements, so that he was able to pay his laborers in cash and conceal his employment activities from the government.

https://www.justice.gov/archive/usao/ak/news/2010/September/Stubbs_Esteban_09-23-10.html.)

- In 2015, an employer was ordered to pay more that $200,000 in back wages to 178 employees who had been misclassified as independent contractors. The misclassification resulted in a loss of overtime pay for the employees, who worked 50 to 70 hours per week but were denied overtime pay. In announcing the penalty, the Department of Labor stated that, "[s]imply labeling a worker as an independent contractor does not mean they are not truly an employee. *Misclassified employees are not only denied fair wages, they are also denied access to critical benefits and protections*" (emphasis added). (Dept. of Labor News Brief dated Dec. 15, 2015, available at https://www.dol.gov/opa/media/press/whd/WHD20152312.htm.) The Department further stated that corrective action was necessary to "ensure that [employees] are paid their legally-required wages and *to level the playing field for employers who play by the rules*" (emphasis added). (*Id.*)
- In 2016, two construction employers were ordered to pay nearly $2.4 million in back wages and liquidated damages to 478 employees, the bulk of whom had been misclassified as independent contractors. This misclassification allowed the employers to avoid paying overtime and other benefits under the FLSA. In announcing the remedy and penalties, the Department of Labor observed that, "[t]he misclassification of employees as independent contractors is a serious problem that hurts workers, taxpayers, and the entire economy in multiple ways. … *It robs employees of their rights to proper wages, safe workplaces, social*

security payments, and unemployment and workers compensation insurance. It deprives federal and state governments of needed tax revenues. *And, it undercuts law-abiding employers who pay their workers legally and play by the rules*" (emphasis added). (Dept. of Labor News Release dated Aug. 2, 2016, available at https://www.dol.gov/newsroom/releases/whd/whd20160802.)

- In 2017, two owner-operators of a drywall employer were sentenced to federal prison for submitting false payroll forms in connection with a construction project at the CDC. The employer maintained a double payroll system, paying employment taxes for one set of employees (labeled "W2.REAL") and not paying such taxes for another set of employees (labeled "W2.F.2CHK"). The U.S. Attorney noted that "[w]orkers classified as 'W2.F.2CHK' performed many of the same job duties as those who classified 'W2.REAL.'" (U.S. Attorney News Release dated Dec. 13, 2017, available at https://www.justice.gov/usao-ndga/pr/norcross-business-owners-sentenced-defrauding-cdc.)

As these cases demonstrate, the construction industry is an especially fertile ground for misclassification of employees, whether it involves U.S.- or foreign-born workers. The government agencies responsible for correcting such abuses are aware of the need to address employee misclassification not only as an unlawful act in and of itself, but also as a pervasive practice in certain industries that leads to the violation of other laws and generally undermines the competitive position of law-abiding employers.

The act of misclassifying an employee undermines the competitive position of law-abiding employers in addition to the right of employees to organize and bargain collectively. Employers who misclassify employees do so with a preclusive effect <u>regardless of intent</u> and

should not be insulated in any way from the requirements of the National Labor Relations Act. The ALJ's finding in *Velox* that employee misclassification is a per se violation of NLRA Section 8(a)(1) is a step towards remedying the situation—one that is supported by Board precedent and policy.

V. CONCLUSION

For the foregoing reasons, SWACCA respectfully requests that the Board affirm the ALJ's finding that a misclassification by an employer is a per se violation of Section 8(a)(1) of the National Labor Relations Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Brief of *Amicus Curiae* Signatory Wall and Ceiling Contractors Alliance in Case 15-CA-184006 was electronically filed via NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 30th of April, 2018.

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